IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07/04/2004

Coram

The Hon'ble Mr.JUSTICE K.GOVINDARAJAN
and
The Hon'ble Mr.JUSTICE N.KANNADASAN

L.P.A.No.159 of 2001

Vellipalayam Co-operative Milk Supply
Society, rep., by its Special Officer
Sattiyappar East Street
Nagapattinam 611 001
.. Appellant
-Vs-

Regional Director
Employees State Insurance Corporation
Madras.34. .. Respondent

Appeal preferred against the judgment dated 8.6.2000 made in C.M.A. No.273/1993 against the order dated 8.12.1992 made in E.S.I.O.P.No.33/1988 on the file of the Employees State Insurance Court, Nagapattinam.

!Mr.Srinath Sridevan : Counsel for appellant

^Mrs.Jayakumari :Counsel for respondent

:JUDGMENT
K.GOVINDARAJAN,J.

The petitioner before the Employees State Insurance Court, Nagapattinam, in E.S.I.O.P.No.33/1998 filed the above appeal, having aggrieved by the judgment of the learned single Judge in C.M.A.No.273/1993, dated 8.6.2000, confirming the order passed in E.S.I.O.P.No.33/1988.

2. The appellant is a Co-operative Society registered under the the provisions of the Co-operative Societies Act. The Society has been purchasing milk from the cattle owners and after selling the milk, if there was any excess, they used to store it in a cooler for storage and it will be sold to the customers later. The Employees State Insurance Corporation issued a show cause notice on 28.9.1988 to determine and recover damages under Sec.85(B)(1) of the Employees State Insurance Act, hereinafter called 'the E.S.I.Act'. It is also stated that from December 1982, the Society has been paying the contribution to the Employees State Insurance Corporation regularly. An order was passed asking the appellant to pay contribution of a sum of Rs.21,385/for

the period from 14.5.1978 to 30.11.1982 stating that the cold storage was installed only in the year 1984 and so the Society cannot be construed as a factory as defined under Sec.2(12) of the E.S.I. Act as no manufacturing process was being carried on. Challenging the same, the Society filed a petition before the E.S.I. Court .

3. The same was contested by the Employees State Insurance Corporation stating that the Society has been involved in the manufacturing process within the meaning of Sec.2(12) of the E.S.I. Act and the meaning assigned to the expression "manufacturing process" under the Factories Act, 1948. By an amendment to the Factories Act, 1948, the process of storing any article in cold storage deep freezer etc., had been brought under the definition of "manufacturing process" under Sec.2(k) of the Factories Act with effect from 26.10.1976. On that basis a sum of Rs.21,384.38 was calculated as contribution.

4. The E.S.I. Court held that the Society was liable to pay contribution for the period from 14.5.1978 to 30.11.1982. So, the Society preferred an appeal in C.M.A.No.273/1993 and the learned Judge also found that in view of the amendment to the Factories Act with respect to the definition "manufacturing process", the petitioner also is liable to pay contribution. Aggrieved against the same, the appellant preferred the above Appeal.

5. Learned counsel for the appellant submitted that the learned Judge is not correct in applying the subsequent amendment to the expression "manufacturing process" to the provisions of the E.S.I. Act, merely because the said expression has been incorporated in the E.S.I. Act by reference. In effect, according to him, the expression " manufacturing process" as it stood at the relevant time, has to be applied and not the subsequent amendment.

6. Learned counsel for the respondent-corporation submitted that the E.S.I. Act and the Factories Act are supplemental to each other and so the amendment to the Factories Act has to be taken into consideration to assess the liability of the appellant-society. Otherwise, the provisions of the E.S.I. Act are only unworkable and ineffectual.

7. The points for consideration in this appeal are:-
(1)Whether the definition of 'manufacturing process" under the Factories Act 1948 as amended under the Act 94 of 1976 has been incorporated under Sec.2(12) of the E.S.I. Act?

(2) Whether there is a mere reference or citation of the definition of 'manufacturing process' under the Factories Act 1948 in the E.S.I. Act?

8. The Employees State Insurance Corporation came into effect from 1 9.4.1998. Sec.2(12) of the E.S.I. Act defines "factory", which runs as follows:-

"2. Definitions:- In this Act, unless there is anything repugnant in the subject or context,-
.. ..

(12) 'factory' means any premises including the precints thereof whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952), , or a railway running shed;
"seasonal factory" means a factory which is exclusively engaged in one or more of the following manufacturing processes, namely cotton ginning, cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar, (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes;
and includes a factory which is engaged for a period not exceeding seven months in a year-
(a) in any process of blending, packing or repacking of tea or coffee;
or
(b) in such other manufacturing process as the Central Government may, by notification in the official gazette, specify.
The expressions "manufacturing process" and "power" shall have the meaning respectively assigned to them in the Factories Act, 1948."
The incorporation of the definition "manufacturing process" as defined in the Factories Act was made under the Act 44 of 1966 with effect from 28.1.1968.
9. To understand the said definition, we have to refer the definition of "manufacturing process" and "power" as defined under the Factories Act. We are now concerned only with "manufacturing process". So, the same is extracted as defined under the Factories Act, 1948, which reads thus:-

"manufacturing process" means any process for -

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal; or
(ii) pumping oil, water, sewage or any other substance; or
(iii) generating, transforming or transmitting power; or
(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or
(v) constructing, reconstructing, repairing, refitting,finishing or breaking up ships or vessels;
(vi) preserving or storing any article in cold storage;"

10. Clause (vi), namely, preserving or storing any article in cold storage, was included under Act 94 of 1976 as the same was not there originally.

11. On that basis, learned counsel for the appellant submitted that the said portion of the definition cannot be read to understand the meaning of "factory" as defined under Sec.2(12) of the E.S.I. Act. According to him, if the said definition cannot be applied, then the appellant is not liable to pay any contribution till 1982 as claimed by the Corporation. Learned counsel for

the appellant relied on the decision of the Apex Court in Bhatinda Improvement Trust v. Balwant Singh, 1992 S.C. 2214, in support of his submission.

12. The learned Judge found that the decision in Secretary of State for India in Council v. Hindustan Co-operative Insurance Society Ltd., AIR 1931 PC 149 cannot be relied on in view of the subsequent decisions of the Apex Court. The learned Judge relied on the decision in State of M.P. v. M.V.Narasimhan, AIR 1975 S.C. 1835 to come to the conclusion that the amendments to the Factories Act by necessary intendment would apply to the provisions of the E.S.I. Act.

13. Ordinarily, if an Act is incorporated in a later Act, the intention is to incorporate the earlier Act with all amendments made in it up to the date of incorporation. The rule that repeal or amendment of the Act which is incorporated by reference in a later Act is not applicable for the purpose of the later Act, is subject to qualification and exception. As held in Balaji vs. Gopikabai,1978 (2) SCC 542, broadly speaking, legislation by referential incorporation falls into two categories. First, where a statute by specific reference incorporates the provisions of another statute as of the time of adoption. Second, where a statute incorporates by general reference, the law concerning a particular subject as a genus. In the case of first category, the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. In the case of next category, it may be presumed that the legislative intent was to include all the subsequent amendments also made from time to time in the generic law on the subject adopted by general reference. Specific reference incorporating the provisions of another Act is only to save the trouble of repeating the same things, but the provisions referred to are made part of the second statute as much as if they had been expressly incorporated therein.

14. While considering the scope of the said incorporations, the Apex Court in the decision in Nagpur Improvement Trust v. Vasanti Rao, 20 02(7) SCC 657, held as follows:-
"31. ... The law on the subject is well settled. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation which merely contains a reference or the citation of the provisions of an earlier statute. In a case where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second. The later Act along with the incorporated provisions of the earlier Act constitutes an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. However, where in a later Act there is a mere reference to an earlier Act, the modification, repeal or amendment of the statute that is referred, will also have an effect on the statute in which it is referred. It is equally well settled that the question whether a former statute is merely referred to or cited in a later statute, or whether it is wholly or partially incorporated therein, is a

question of construction.
.. .. ..
36. It is also well settled that the a question as to whether a particular legislation falls in the category of referential legislation or legislation by incorporation depends upon the language used in the statute in which reference is made to the earlier decision and other relevant circumstances."

15. The Apex Court also considering the decision in State of M.P. v. M.V.Narasimhan,1975(2) SCC 377 which nominated four exemptions to the Rule that incorporated the provisions of the previous Act which have become an integral and independent part of the subsequent Act are totally unaffected by any repeal or amendment in the provisions of the Act.
Such exemptions are:-
(1) The subsequent Act and the previous Act are supplemental to each other;
(2) where the two Acts are in pari materia;
(3) where the amendment in the previous Act if not imported into the subsequent also which would render subsequent Act wholly unworkable and ineffectual;
(4) where the amendment of the previous Act either expressly or by necessary intendment applies to the said provisions to the subsequent Act.

16.Though the learned counsel for the appellant cited the decision of the apex Court in Bhatinda Improvement Trust v. Balwant Singh, AIR 1992 S.C. 2214, ((1991) 4 SCC 368), in the above said decision, in 2002(7) SCC 657, the Apex Court held that they were not in a position to subscribe the view taken in the said decision in AIR 1992 S.C. 2214 with respect to incorporation of Land Acquisition Act into the Punjab Act.

17. The expression "manufacturing process" as defined under the Factories Act, 1948 is by specific reference incorporated to the definition of Factory under Sec.2(12) of the E.S.I. Act and thereby in the normal course, we have to come to the conclusion that subsequent amendment, if any, made in the Factories Act with reference to the said expression cannot automatically be read into the definition "factory" of the E.S.I. Act. This conclusion is on the basis of settled principles regarding interpretation of statute. But, even in the case of incorporated definition, as in our case, while the general principle is that the incorporated definition remains static and is unaffected by the developments or fluctuations of the parental source from which it was incorporated, the well recognised exemptions formulated by the Apex Court in the decision in the State of M.P. v., M.V.Narasimhan, 1975(2) SCC 377, could be applied for adopting the doctrine of purposive interpretation. The said decision has been followed and applied subsequently in the decisions in -
(1) 1989 Supp (1) SCC 733 (State of Kerala v. Attesee (Agro Industrial Trading Corpn.)

(2) 1993 Supp (3) SCC 627 (Forest Range Officer v. P.Mohammed Ali
(3) (1994) 1 SCC 92 Gauri Shankar Gaur v. State of U.P.
(4) (1995) 6 SCC 642 Govt. of T.N. v. S.Balasubramanian

(5)(1998)3 Supp SCC 276 (Maryappa v. State of Karnataka)

18. In the present case, the learned Judge has appreciated the issue in question on the basis of exceptions envisaged in the decision in 1975(2) SCC 377 (supra). For that purpose, we have to appreciate the object of the E.S.I. Act 1948, which is of social welfare legislation enacted primarily with the object of providing certain benefits to employees in case of sickness, maternity, employment and injury and also to make provisions for certain other matters identical thereto. The E.S.I. Act as contemplated under Sec.1(4) shall apply to all factories other than seasonal factories. Sec.1(9) of the E.S.I. Act deals with employees, which means any person employed for wages in or in connection with the work of factory or employees to which the Act applies. As rightly found by the learned Judge, the object of Factories Act is also to consolidate, amend and to regulate the labour in the factories. From the above, it is clear that the intention of the E.S.I. Act is to shower all the benefits on the employees who are working in the "factory" as defined under Sec.2(12) of the E.S.I. Act which is carrying on "manufacturing process" as defined under the Factories Act, 1948. If we accept the submission of the learned counsel for the appellant that the subsequent amendment to the definition of "manufacturing process" under the Factories Act cannot be adopted to the definition of "factory" under Sec.2(12) of the E.S.I. Act, some of the employees cannot get such benefit provided under the E.S.I. Act. It may result in discrimination. It cannot be the intention of the legislature as contemplated under Sec.8 of the General Clauses Act, 1897, to exclude such employees by interpreting the definition as the learned counsel for the appellant wants. The said submission also can be rejected on the basis of the observations made in the decision in 1993 Supp (3) SCC 627 (supra), in which it is held as follows:-

"The language of a statutory provision is not a static vehicle of ideas and concepts and as ideas and concepts change, as they are bound to do in any country like ours with the establishment of a democratic structure based on egalitarian values, the meaning and content of the statutory provision undergo a change. The law does not operate in a vacuum. It cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. The judge has to inject flesh and blood in the dry skeleton provided by the legislature and invest it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivering justice."

19. Taking into consideration the object and scheme of the E.S.I. Act, if restricted meaning as sought for on behalf of the appellant is given, it would frustrate the object, and the literal interpretation would defeat the meaning. Moreover, both the Acts are supplemental to each other and on the object, the two Acts are in para materia. So, the learned Judge, applying the case of the appellant found that exemption No.(4) as set out in para 14, would very much apply to the present case. We do not find any reason to deviate from the said reasonings and so apply the exemption contemplated in the decision in 1 975(2)SCC 377 (supra). We have to understand the impugned definition applying the subsequent amendments to the expression "manufacturing process" in the Factories Act, 1948. If we apply the judgment of the Division Bench of this Court in The Kumbakonam Milk Supply Cooperative Society v. The

Regional Director, ESI Corporation, 2003-2-L.W. 513 ,, the demand raised by the Corporation is in accordance with law and so we do not find any reason to interfere with the judgment dated 8.6.2000 of the learned Judge.

20. Accordingly, this Appeal is dismissed. No costs.

Index:yes
Internet:yes

sks

To
1.The Employees State Insurance Court, Nagapattinam
2.The Sub-Asst. Registrar, Judicial, High Court, Madras.104.